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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE JESSE H., a Person Coming Under
the Juvenile Court Law.

H026624

(Monterey County
Super. Ct. No. J36568)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE H.,

Defendant and Appellant.

The minor, Jesse H., was taken into custody on September 2, 2003, on an outstanding warrant. At the time he was found, he had a gang tattoo and was asleep in bed while having on his person a pouch containing an unloaded firearm and live ammunition. He appeals from an order continuing him as a ward of the court and placing him in the youth center after the juvenile court found true allegations that he actively participated in a criminal street gang, and that he possessed the firearm and ammunition for the benefit of a criminal street gang. On appeal the minor contends that there is insufficient evidence to support the court's findings that he actively participated in a

criminal street gang or that he committed any offense for the benefit of a criminal street gang. He also contends that the trial court failed to exercise its discretion to determine whether some of his offenses were felonies or misdemeanors, and that the court erred in calculating the maximum period of confinement. As we agree with the minor's first contention, we will reverse the dispositional order and remand the matter for a new disposition hearing.

BACKGROUND

The minor (born in February 1987) was declared a ward of the juvenile court in June 2002, after he admitted allegations in a Welfare and Institutions Code section 602¹ petition filed May 21, 2002, of receiving stolen property, being a gang member in possession of a concealed weapon, possessing a concealed weapon, and battery. The court placed him on probation with the standard terms and conditions, including full gang terms. Less than one week later the minor was detained by local police for a curfew violation, for associating with another probationer, and for being in a vehicle where a weapon was found. In July 2002, the minor admitted the curfew violation and possessing a marijuana pipe. On October 11, 2002, he was removed from the physical custody of his parents and ordered into a group home. The minor was admitted to the group home on November 8, 2002, but absconded 19 days later.

After the minor was returned to custody, he was ordered placed at Unity Care. While en route to the placement on January 13, 2003, the minor fled from the transport vehicle. A section 777 petition alleging that the minor violated his probation was filed on January 17, 2003. The minor was taken into custody on September 2, 2003, on an outstanding warrant.

¹ Further unspecified statutory references are to the Welfare and Institutions Code.

On September 8, 2003, a section 602 petition was filed alleging that the minor possessed a concealable firearm (Pen. Code, § 12101, subd. (a)(1); count 1), possessed live ammunition (Pen. Code, § 12101, subd. (b)(1); count 2), carried a concealed firearm while an active participant in a criminal street gang (Pen. Code, § 12025, subd. (b)(3); count 3), carried a concealable firearm upon his person (Pen. Code, § 12025, subd. (a)(2); count 4), and actively participated in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 5). The petition further alleged that the minor committed the offenses in counts 1, 2 and 4 for the benefit of or at the direction of a criminal street gang (Pen. Code, § 186.22, subds. (b)(1), (d)). The petition also alleged that the previous disposition of the juvenile court regarding the May 21, 2002 petition has been ineffective in the rehabilitation of the minor (§ 777).

A contested jurisdiction hearing was held on September 29, 2003. Salinas Police Officer Tim Simpson testified that on September 2, 2003, at about 10:30 p.m., he and another officer went to a residence on Peach Drive. A family member had called with information that the minor was there, and there was an outstanding warrant for the minor's arrest. The officers found the minor in a bedroom, asleep on a bed covered by a blanket. After waking the minor, the officers asked him to remove the blanket so that they could see his hands. When the minor did so, the officers saw that he was fully dressed with the exception of shoes, and that he had a set of dice with the number 14 on them tattooed on one of his elbows. The officers took the minor into custody. Officer Simpson pat-searched the minor before placing him in the patrol car. The officer found a red velvet bag containing an unloaded .38 handgun and five .38 rounds of ammunition in the minor's right front pants pocket.

Salinas Police Officer Vicky Burnett testified that she has been assigned to the violence suppression unit as a gang intelligence officer since 2001. Over 600 persons claiming to be Norteños are in Salinas. In her opinion, the Norteño gang is a criminal street gang which has as its primary activities homicide, robbery, car jacking and

shooting at occupied dwellings and vehicles, all crimes listed in section 186.22, subdivision (e), of the Penal Code. Two admitted Norteño gang members were convicted of homicide, and another admitted Norteño gang member was convicted of robbery, in August 2002. Norteños associate with the color red and the number 14.

Officer Burnett reviewed records of 10 of the minor's contacts with the Salinas Police Department. In six of those contacts, which occurred between June 2001 and June 2002, the minor associated with other gang members. During her personal contact with the minor in April 2002, the minor stated that he had been associated with Norteños since he was in sixth grade and that he has a lot of family members who are Norteño gang members. At the time of the April 2002 contact, the minor had "X4" written on his left wrist. The minor was wearing a red belt that had a metal buckle with the letter "C" cut out, and on the inside of the belt "ELC" was written in black ink. "ELC" stands for East Las Casitas, a Salinas Norteño gang, and the minor admitted being an ELC Norteño member. The minor also had a brown wallet with "ELC" written on it in dark ink. Inside the wallet were red pieces of paper on which was written "XIV" and "ELC." In addition, the minor had two newspaper articles, one about a Norteño who was shot and killed and the other about a Norteño who was involved in a shooting. These articles "show knowledge that gang members commit crimes," and the minor admitted that he knew that Norteño gang members committed killings, robberies, and assaults. The minor also had a red cassette tape put out by a Norteño-sponsored company on which "XIV" was written, and a knife. The minor told Officer Burnett that, for him, "Norte was a religion," and that he had problems with Sureños because some of his family members were killed by Sureños.

When the minor was contacted by Salinas Police Officer Will Williams in May 2002, he was with an admitted Norteño gang member. He had in his possession a brown wallet with "X4" written on it and "ELC" inscribed inside. Inside the wallet was a picture of three persons on which it was written "187 scraps." Scraps is a derogatory

term Norteño gang members use to identify members of Sureño gangs, rivals of Norteño gangs, and 187 is the section of the Penal Code for homicide. In addition two of the persons in the picture, identified as Sureño gang members, were crossed out.

In Officer Burnett's opinion, based on her review of the records of police contacts and the fact that the minor had a gun in a red pouch and had 14 tattooed on his elbow when Officer Simpson contacted him in September 2003, the minor is an active participant of a criminal street gang. Also in Officer Burnett's opinion, the minor possessed the firearm to benefit the gang.

In finding all the allegations in the section 602 petition true, the court stated: "What we do have is someone who has had many contacts with the police, who ha[s] been associated with persons who are either admitted known gang members or in association with known gang members beginning in April of '02. That his contact in April of '02 he did not have the gang marking tattoo on his elbow. And he did, though, in fact, have the color red with him, the ELC gang moniker, East Las Casitas, and a variety of other gang paraphernalia and indicia. [¶] Now, what we have is becoming somewhat of a bit more than a year after the fact, we have a tattoo. Don't know when he received the tattoo, but we know it's post his last contact with the police department. So that suggests he's still ongoing, if you have a new tattoo sometime after your last contact with the police department. Then you've got somebody carrying a firearm[,] who's on a wanted status for a warrant[,] in a red pouch, which red is associated with the Norteño street gang. I would say based on the testimony of the gang expert, and it is sufficient in most all of the cases the Court has read, and does have a copy in front of them, the Court can rely on the testimony of a gang expert in making a finding beyond a reasonable doubt that, in fact, the allegations in the petition are true. [¶] And the Court has found that the evidence that's presented, the only evidence that has been presented to the Court with respect to any explanation as to why the minor would possess the firearm has only been given by the gang expert. No other explanation has been provided to the Court. And

there's nothing so far that the Court has seen in the testimony that is insufficient as far as the lack of qualification of the expert and/or lack of knowledge as to the information that she possessed and/or inability to draw opinions and/or conclusions.”

The probation officer's report for the dispositional hearing calculated the minor's maximum time of confinement, after aggregation of the terms with prior sustained petitions, to be 14 years, two months. The probation officer recommended that the minor be placed in the youth center program for 407 days, with 42 days credit for time served. At the disposition hearing on October 14, 2003, the minor's counsel argued that the maximum time of confinement should be nine years, 10 months, because the terms for all the September 2003 offenses should run concurrent pursuant to Penal Code section 654. After a discussion between the court and the parties, they all agreed that the maximum time of confinement would be nine years, two months. The court followed the recommendation of the probation officer, continued the minor as a ward of the court, and placed in him in the Youth Center. The minor filed a timely notice of appeal.

DISCUSSION

The minor first contends that the prosecution failed to prove two essential elements of the substantive gang offense as alleged in count 5: that he “actively participates in any criminal street gang,” and that he “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” (Pen. Code, § 186.22, subd. (a).) He argues that the happenstance of the gun pouch being red “is far too tenuous” to amount to active gang participation, that the evidence of the tattoo was “stale and indeterminative,” and that he was alone and asleep at the time he was found, thus he could not have been participating any gang activity.

The minor also contends that the prosecution failed to prove an essential element of the gang enhancement as alleged in counts 1, 2, and 4: that he committed the offenses “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang

members.” (Pen. Code, § 186.22, subds. (b)(1), (d).) He argues that there was no evidence that, at the time of the offenses, he was a member of the Norteño gang or that he was involved in or in any way associated with gang activity.

“When the challenge is to the sufficiency of the evidence, ‘ “[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.” ’ [Citations.] We view the evidence in the entire record in the light most favorable to the respondent and we presume the existence of every fact in support of the judgment that the trier could reasonably deduce from the evidence. [Citation.] To be substantial, the evidence must be of ‘ “ponderable legal significance . . . reasonable in nature, credible, and of solid value.” ’ [Citation.]” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 465-466 (*Jose P.*).

Penal Code section 186.22, subdivision (a), creates a substantive offense.² A person need not be a gang member to be guilty of violating the section, but he or she must have had more than a nominal or passive involvement with the gang, knowing of the gang’s pattern of criminal activity, and must have aided and abetted a separate felony committed by gang members. (*People v. Castenada* (2002) 23 Cal.4th 743, 752 (*Castenada*); *Jose P.*, *supra*, 106 Cal.App.4th at p. 466; see also *People v. Green* (1991) 227 Cal.App.3d 692, 703-704 [anyone violating Pen. Code, § 186.22, subd. (a) “would also . . . be criminally liable as an aider and abettor to any specific crime” committed by the gang’s members].) “As we have explained, section 186.22(a) imposes criminal liability not for lawful association, but only when a defendant ‘actively participates’ in a

² “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” (Pen. Code, § 186.22, subd. (a).)

criminal street gang while also aiding and abetting a felony offense committed by the gang's members.” (*Castenada, supra*, 23 Cal.4th at pp. 750-751.)

Penal Code section 186.22, subdivisions (b)(1) and (d), create sentence enhancements.³ Under either provision, the offense of which the minor is found to have committed must have been “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Pen. Code, § 186.22, subds. (b)(1), (d).)

We agree with the minor that the record does not support the finding that he violated Penal Code section 186.22, subdivision (a), on September 2, 2003, as alleged in count 5. Although there was ample evidence that the minor previously associated with a Norteño gang in Salinas, knowing of the gang's pattern of criminal activity, there was no evidence that his gang involvement was more than “ ‘nominal’ ” or “ ‘passive’ ” (*Castenada, supra*, 23 Cal.4th at p. 752) on September 2, 2003. The evidence did not show that the minor continued to actively associate with Norteño gang members after his last police contact in June 2002. In addition, there was no evidence that he aided and abetted a separate felony committed by gang members on September 2, 2003. He was

³ “(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.” (Pen. Code, § 186.22, subd. (b).) “Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, . . .” (Pen. Code, § 186.22, subd. (d).)

asleep in bed when he was found by police and taken into custody, and there was no evidence that any crimes had been committed by Norteño gang members that day. Officer Burnett testified that, in her opinion, based on the minor's relatively recent tattoo and possession of a gun in a red pouch, the minor was an active participant in the ELC Norteño gang. We conclude that sleeping in bed while having a gang tattoo and possessing a gun is not sufficient evidence to support a finding that the minor violated Penal Code section 186.22, subdivision (a), because the minor was not at the same time aiding and abetting a separate felony committed by other gang members. The finding as to count 5 that the minor violated Penal Code section 186.22, subdivision (a), must be stricken.

We also agree with the minor that the record does not support a finding that the minor's possession of the gun and ammunition as alleged in counts 1, 2 and 4, was "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (Pen. Code, § 186.22, subds. (b)(1), (d).) The minor was not with any gang members when he was taken into custody on September 2, 2003. He was in bed alone, asleep and there is no evidence to support the specific intent required by the statute. In addition, there was no evidence, other than the relatively recent gang tattoo, that the minor continued to associate with Norteño gang members after his last police contact in June 2002, some 15 months earlier. Sleeping in bed while having a gang tattoo and possessing a gun and/or ammunition is not sufficient to support a finding that the items were possessed with the specific intent to promote, further, or assist in any criminal conduct by gang members unless the minor was also currently associating with gang members. No evidence of current active gang involvement was presented. The enhancement findings as to counts 1, 2, and 4, must also be stricken.

The court requested supplemental briefing as to the issue whether, if there is insufficient evidence to support the substantive gang offense alleged in count 5 and/or the gang enhancements alleged in counts 1, 2, and 4, there is also necessarily insufficient

evidence to support the substantive offense alleged in count 3. Count 3 charged the substantive offense of carrying a concealed firearm while being an active participant in a criminal street gang. (Pen. Code, § 12025, subd. (b)(3).) In respondent's letter brief filed in response to the court's request, respondent conceded that, if there is insufficient evidence to support the finding that the minor violated Penal Code section 186.22, subdivision (a), then there necessarily is insufficient evidence to support the true finding as to count 3. We find the concession appropriate. Therefore, the finding that the minor violated Penal Code section 12025, subdivision (b)(3), must also be stricken.

As we have found that the findings as to counts 3 and 5, as well as the findings as to the gang enhancements as to counts 1, 2, and 4, must be stricken, we will remand the matter to the juvenile court for a new disposition hearing. At the hearing, the court shall make a finding as to whether the offenses in counts 1 (Pen. Code, § 12101, subd. (a)(1)) and 2 (Pen. Code, § 12101, subd. (b)(1)) are felonies or misdemeanors. (§ 702; *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.) The court shall also recalculate the minor's maximum time of confinement.

DISPOSITION

The true finding as to counts 3 and 5, and as to the gang enhancements in counts 1, 2, and 4, are stricken. The juvenile court order of jurisdiction is otherwise affirmed. The

disposition order of October 14, 2003 is reversed. The matter is remanded for a new disposition order.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MCADAMS, J.